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No. 04-889

Supreme Court, U.S.
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In The Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Petitioner,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND LAKE MICHIGAN FEDERATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICUS CURIAE BRIEF OF THE CSO PARTNERSHIP IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

1. The Combined Sewer Overflow Partnership ("CSO Partnership") moves pursuant to Supreme Court Rules 37(b) and 33.1 for leave to file the enclosed amicus curiae brief in this case for the reasons set forth below.

2. The CSO Partnership sought the consent of all of the parties to the filing of this amicus brief. Petitioner Milwaukee Metropolitan Sewerage District consented to the filing while Respondents Friends of Milwaukee's Rivers and the Lake Michigan Federation withheld consent.

3. The CSO Partnership represents communities throughout the United States with combined sewer systems. The CSO Partnership's members have invested hundreds of millions of dollars in planning, designing, permitting and construction of combined sewer overflow facilities and are regulated under federal and state law. The CSO Partnership's members strive to protect public health and the environment in an affordable and cost-effective manner.

4. The decision by the United States Court of Appeals for the Seventh Circuit in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District* (Pet. App. 1a – 33a) misconstrues the Clean Water Act as it applies to combined sewer overflow systems and establishes a procedure for the review of consent decrees which, in the context of combined sewer overflow systems, will essentially prevent communities from entering consent decrees with state or federal authorities to plan for future upgrades to their sewer systems. The impact of this decision on combined sewer overflow communities will be severe because planned investments in sewer systems costing billions of dollars will no longer be subject to court approval

and communities will be unable to set budgets for these enormous expenditures of public resources.

5. The CSO Partnership's amicus brief fully complies with Supreme Court Rule 37.1 because it "brings to the attention of the Court relevant matter not already brought to its attention by the parties" and it "may be of considerable help to the Court." The CSO Partnership's unique nationwide perspective and expertise on the subject matter of this case will assist the Court in considering the issues raised in petitioner's petition for writ of certiorari.

Accordingly, the CSO Partnership moves for leave to file the enclosed amicus brief.

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INTEREST OF AMICUS

The CSO Partnership is a national association of communities with combined sewer systems. Partnership members have been recognized for years by the U.S. Environmental Protection Agency and by states for their proactive compliance programs. The Partnership participated in the development of EPA's national combined sewer overflow policy (" the CSO Policy") and led the effort to have the CSO Policy incorporated into the Clean Water Act (the "Act"), 33 U.S.C. § 1342(q).

Many of the Partnership members have more advanced combined sewer overflow ("CSO") control programs than their peer communities nationwide. Most Partnership members have either negotiated state or federal enforcement mechanisms to implement their CSO long-term control plans or they are in the process of doing so. The state and/or federal settlement agreements Partnership members have entered into were not developed consistent with the Seventh Circuit's "no realistic prospect" standard. Accordingly, the significant public investments made to date by Partnership members pursuant to these agreements following agency enforcement actions could be jeopardized by intrusive citizen suits that would be permissible under this standard. Moreover, Partnership members' ability to arrive at final long-term control plans ("LTCPs") with federal and state enforcement agencies would be subject to the Seventh Circuit's "no realistic prospect" test rather than the more deferential tests adopted by other federal circuit courts.

SUMMARY OF ARGUMENT

Certiorari should be granted in this case to correct the Seventh Circuit's erroneous ruling that government enforcement actions must ensure "no realistic prospect" of future violations in order to preclude citizen actions under the Clean Water Act for the same alleged non-compliance. The Seventh Circuit's ruling in this regard is erroneous for the following reasons:

- The Seventh Circuit's "no realistic prospect" standard under the Act impermissibly and incorrectly adopts and expands Second Circuit precedent. The Seventh Circuit and Second Circuit standard for judging when a state is diligently prosecuting conflicts with cases from the First, Sixth and Eighth Circuits and a prior decision of this Court;

- The standard precludes essential iterative or phased solutions to achieving compliance with the Act;

- The standard requires the district court to accord only "some" deference to government enforcement decisions and upsets the Act's scheme of giving primary enforcement authority to states and the federal government.

- The standard is based upon the misreading of the Act as requiring the elimination of overflows rather than the control of overflows. Notably, the Act only requires the elimination of dry weather overflows and not the wet weather overflows that are at issue in this case; and

- It would allow and encourage a reopening of existing agency enforcement actions adopted by courts nationwide by citizen groups, to the detriment of the

massive public investments made in reliance on those actions.

Based upon the foregoing, the CSO Partnership urges the Court to grant certiorari to review the decision of the Seventh Circuit in this case. Certiorari is necessary to resolve the conflict between the circuits over the proper enforcement of the Act, and avoid creating uncertainty over tens of billions of public dollars being invested to control sewer overflows.

ARGUMENT

I. THE SEVENTH CIRCUIT'S RULING THAT THE DILIGENT PROSECUTION BAR ONLY APPLIES WHEN GOVERNMENT ACTION GUARANTEES NO FUTURE VIOLATIONS WILL OCCUR CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND A PRIOR DECISION OF THIS COURT.

In remanding the case to the district court, the Seventh Circuit pronounced a standard for determining when a governmental action will constitute diligent prosecution and thereby bar a plaintiff's citizens' suit under the Act. The Court ruled that plaintiffs' suit may proceed if the district court concludes that "there is a realistic prospect that violations due to the same underlying causes," purportedly addressed by the State of Wisconsin's action against Milwaukee, "will continue after the planned improvements are completed." Pet. App. 33a. In other words, only if the district court finds that the Wisconsin-Milwaukee state court decree guarantees that future violations will not occur will the State action cut off the citizens' suit.

The Seventh Circuit's "no realistic prospect" standard is not found anywhere in the Act and fundamentally disrupts the enforcement structure of the Act.[1] Under the Act, federal and delegated state agencies have primacy in enforcement, with citizen suits allowed only where the government declines to act or to where the citizen suit supplements the reach of government enforcement. The Seventh Circuit standard would impermissibly disrupt this fundamental statutory construct by allowing citizen suits where the governmental agencies decided to act, but not to the extent (according to citizen plaintiffs and federal judges) of preventing a "realistic prospect" of continuing violations. Nowhere is this immense intrusion into agency enforcement countenanced in the Act and, in fact, this approach is in direct conflict with this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987), which recognized that "the citizen suit provision is meant to supplement rather than to supplant governmental action," as petitioner explains in its petition. Pet. 11-13.

II. THE SEVENTH CIRCUIT'S RULING WILL PRECLUDE ESSENTIAL PHASED OR ITERATIVE APPROACHES BY GOVERNMENT ENFORCEMENT.

The Seventh Circuit's "no realistic prospect" standard is not only inconsistent with the express structure of the

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[1] The Seventh Circuit's decision extends and significantly expands a decision by the Second Circuit which created – out of whole cloth – the "realistic prospect" requirement that government enforcement will cause the violations to cease before government enforcement would cut off citizen suits. *See Atlantic States Legal Found. Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2nd Cir. 1991). As petitioner sets forth in its petition for writ of certiorari, these decisions by the Seventh and Second Circuits conflict with decisions by the First, Sixth, and Eighth Circuits. Pet. at 20-26.

enforcement provisions of the Act, but it would effectively preclude phased or iterative governmental approaches to compelling compliance. Instead of imposing phased solutions, delegated state agencies and EPA would be forced to always seek ultimate solutions, even when doing so would require the crafting of highly speculative injunctive relief to be implemented over decades.[2]

That is neither contemplated nor required under the Act. Instead, the intent of the Act is that when the governmental agency initiates an arms-length enforcement action, it cuts off citizen involvement. As the Senate Report in the legislative history of the Act noted, the "Committee intends the great volume of enforcement actions [to] be brought by the State" and that citizen suits are proper only "if the Federal, State and local agencies fail in the exercise of their enforcement responsibility." S. Rep. No. 92-414, p. 64 (1971), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, p.1482 (1973). Phased and iterative approaches or solutions imposed in arms-length actions by enforcement agencies are routinely adopted by the courts, as they should be. Under the Seventh Circuit's decision, however, a government agency that announced a phased or iterative approach would surely fail the "no realistic prospect" standard and thereby open the door for intrusive rather than supplemental litigation by citizen plaintiffs.

As explained below, solutions to collection system overflows are often the largest public works projects in communities' histories and can take decades to implement, at costs for large cities like Milwaukee in the billions of

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[2] As the Seventh Circuit noted in citing *Breaking the Vicious Circle: Toward Effective Risk Regulation, Stephen Breyer, 28 (Harvard Univ. Press 1993),* regulatory or enforcement actions requiring perfect solutions in an effort "to achieve the last 10 percent" are often improper expenditures of public resources. Pet. App. 31a-32a, note 15.

dollars. Thus, iterative or phased compliance approaches are both necessary and appropriate and yet would be precluded under the Seventh Circuit's expanded "no realistic prospect" standard.[3]

III. THE SEVENTH CIRCUIT'S RULING FAILS TO ADEQUATELY DEFER TO GOVERNMENT ENFORCEMENT DISCRETION IN THE CRAFTING OF ENFORCEMENT RELIEF.

Beyond impermissibly forcing governmental agencies to craft ultimate solutions in every enforcement action and then defend the adequacy of those solutions from attack by citizen plaintiffs, the Seventh Circuit's "no realistic prospect" standard puts the federal courts in an untenable position of second-guessing, rather than deferring to the adequacy of injunctive relief sought by enforcement agencies. Specifically, federal district court judges will sit as "super agencies" to determine whether the relief sought by governmental agencies will ensure "no realistic prospect" of continuing violations.

These courts will be asked to speculate about the potential for sewer overflows in a community after potentially decades of work called for in state or federal enforcement actions. Moreover, where state or federal enforcers properly admit uncertainty about ultimate solutions and, instead of speculating with public funds,

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[3] While the judicial creation of the "no realistic prospect" standard conflicts with the Act's enforcement scheme in any context, it is one thing to apply such a standard to discharges from Eastman Kodak's very carefully controlled manufacturing operation at its one industrial facility in Rochester, New York and entirely another for the Seventh Circuit to apply such a standard to how the sewers in the greater Milwaukee area will respond to large future rainfall events. *Atlantic States Legal Foundation, 933 F. 2d at 125.*

seek to impose a phased solution, the court will be required under the "no realistic prospect" test to allow a citizen suit to proceed to force the very additional controls which the agencies did not believe could or should be ascertained at this time. This approach impermissibly and unreasonably allows citizen plaintiffs to intrude in, rather than supplement, agency enforcement.

Citizen plaintiffs who may be unhappy with the intensity of governmental enforcement are supposed to wait until after the government mandated relief is implemented before seeking to have the federal courts impose additional measures. This does not mean that citizen plaintiffs cannot bring a challenge to the adequacy of federal enforcement actions. A federal consent decree must be lodged with the approving court for public notice and comment pursuant to 28 C.F.R. § 50.7, giving citizens an opportunity to challenge whether the agency is requiring adequate injunctive relief over the period addressed by the agency's enforcement action. Nothing in the Act prohibits an agency from imposing phased or iterative enforcement solutions if, in the agency's expertise, such an approach is necessary and appropriate.

Beyond the Seventh Circuit's writing into the Act of the "no realistic prospect" approach, the Court also creates a new standard of review of agency enforcement action. Specifically, instead giving deference to a state's enforcement action, the Seventh Circuit instructs the federal district court to accord only "some deference to the judgment of the State." Pet. App. 33a. This is a significant departure from the careful enforcement scheme established in the Act and should be corrected through a grant of certiorari. This lesser degree of deference is particularly inappropriate given the fact that the states in these cases will have already taken enforcement and the citizen's role at that point becomes supplementary. Accordingly, in

these circumstances, logic dictates that the enforcement agencies receive greater rather than lesser deference from the courts.

IV. THE SEVENTH CIRCUIT'S RULING IS IMPRACTICAL BECAUSE SOLUTIONS TO MANY SEWER OVERFLOW CASES WILL REQUIRE DECADES OF WORK AND CONSTANT PROGRAMMATIC RENAVIGATION TO ACHIEVE COMPLIANCE WITH THE ACT.

Combined sewer systems were among the earliest sewer systems constructed in the United States and were built until the earliest part of the 20th century. Projects designed and constructed to control sewer overflows typically involve the largest public works projects in communities' histories. These massive public works projects cannot be implemented overnight and almost always require periodic renavigation. In general, the renovation of aging systems requires installing a new generation of sewer infrastructure beneath America's urban core communities.

Consent decrees addressing sewer overflows are, by necessity, iterative documents setting forth procedures for adjustments over time and are a work in progress aimed at achieving appropriate controls in a fiscally responsible manner. Such consent decrees generally set forth a schedule for completing certain planned construction projects, leaving certain future decisions to be made after the progress of initial projects is evaluated. For example, the following provision related to sanitary sewer overflows ("SSO's") is contained in a 2003 consent decree entered by the U.S. District Court for the Southern District of Ohio:

> WHEREAS, the SSO decree includes explicit recognition of the need expeditiously to

> commence discussions regarding global solutions to address the remaining sewer system issues, and further recognizes that because the schedule for implementing the remaining remedial measures that are to be proposed under the Capacity Assurance Program Plan required by the SSO decree is related to certain other sewer system solutions, the SSO Decree neither requires implementation of, nor provides a final construction completion date for, the SSO remedial measures that will be proposed under the Capacity Assurance Program Plan pursuant to the SSO Decree[4]

This paragraph is a perfect example of the iterative approach that is typically taken when agencies seek to impose sewer overflow control requirements in decrees. Such an acknowledgement does not meet the Seventh Circuit's "no realistic prospect" test of whether future violations will occur, because this is an admission that the planning necessary to address ongoing violations has yet to occur. The public solutions here are as of yet unknown. In these circumstances, the Seventh Circuit's "realistic prospect" test would allow a citizen suit to be maintained to force a solution that is not yet ripe. In the context of wet weather-related sewer overflows, there are diminishing returns – significantly higher costs associated with controlling the last few overflows from the largest storm events. We cannot imagine a greater intrusion on agency enforcement primacy than allowing a citizen group to force a premature and speculative solution to a substantially unknown set of facts that will not be presented for possibly decades.

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[4]*See,http://www.msdgc.org/downloads/consent_decree/global_cd_signed.pdf*

If courts were to mandate that only consent decrees which at the outset guarantee no future overflows will occur could receive court approval, future consent decrees would not be possible, and already negotiated and approved decrees would be subject to being overturned by citizen suits filed by groups seeking to undo the relief already negotiated. It is contrary to this Court's decision in *Gwaltney* to allow citizen groups to interfere with agency enforcement actions that have been negotiated and are being implemented. Such intrusive actions will, contrary to the Act and this Court's precedent, preclude affordable and cost-effective public CSO and SSO controls.

In all cases, sewer overflow control is achieved using public dollars -- literally billions of them. The federal courts should be loathe to create any standard that would require speculative commitments of public funds at the behest of citizen groups who are too impatient to await the outcome of the implementation of arms-length government enforcement.

V. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE CLEAN WATER ACT AND THE COMBINED SEWER OVERFLOW POLICY.

In reaching its decision to reverse the district court and find that the federal citizens' suit was not barred, the Seventh Circuit relied on an incorrect reading the Clean Water Act's provision on combined sewer overflows. 33 U.S.C. § 1342(q). The Court wrongly determined that the Act requires the "elimination of overflows," not just their reduction. Pet. App. 30a-31a. Reviewing only the record in the case, the Court stated "we do not feel confident" that the agreement will result in the "elimination" of the overflows and thus found that the 2002 Stipulation, which did not call

for the elimination of all future overflows, was contrary to the Act. Pet. App. 31a.

The Court's view that all combined sewer overflows must be eliminated in order for a prosecution to be diligent is flatly contradicted by the CSO Policy which was incorporated by reference into Section 1342(q) of the Act. The CSO Policy does not mandate the elimination of all overflows and, in fact, expressly contemplates that entities using best management practices and being in full compliance with the policy will, in most cases, be unable to completely eliminate overflows. The purpose of the policy, as the name implies, is the control of overflows, not the total elimination of all overflows at any cost. The policy recognizes that CSO systems "overflow as a result of wet weather systems" and the policy provides "targets" for CSO "controls" and calls for a coordinated planning effort to achieve "cost effective controls." 59 Fed. Reg. at 18688. Finally, the policy provides for the "necessary flexibility to tailor controls to local situations." 59 Fed. Reg. at 18688.

Moreover, section II.4.a of the CSO Policy lays out several compliance options, including, for example, one that would expressly authorize up to six residual CSOs a year. 59 Fed. Reg. at 18692. In fact, while the CSO Policy calls for the elimination of dry weather overflows from a combined sewer system it expressly only requires the control of wet weather overflows. The CSO Policy expressly acknowledges that it may be impracticable technically and financially to remove or relocate CSO discharges away from even "sensitive" areas such as stream segments above public drinking water intakes. 59 Fed. Reg. at 18692.

With regard to wet weather overflows, one of the four key principles of the CSO Policy is that:

> State water quality standards authorities will be involved in the long-term CSO control planning effort as well. The water quality standards authorities will help ensure that development of the CSO permittees' long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters.

This means that not only are residual overflows contemplated, as opposed to the total elimination sought by the Seventh Circuit, but that state designated uses and water quality standards are envisioned to be revised to accommodate them. This "key provision" of the CSO Policy would be rendered superfluous by the Seventh Circuit's ruling that all overflows had to be eliminated.

The United States Environmental Protection Agency and the United States Department of Justice have recognized, in a number of different contexts, that the CSO Policy does not mandate the elimination of all overflows. A joint Department of Justice and Environmental Protection Agency memorandum addressing key issues arising in negotiations of combined sewer overflow consent decrees refers to "discharges remaining after the implementation of the LTCP."[5] Obviously, if elimination of overflows is the end-goal of a CSO long-term control plan, then there would be no reason to address residual overflows after the implementation of a CSO long-term control plan.

Recent consent decrees in major combined sewer overflow cases also demonstrate that the goal is not the total

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[5] See DOJ/EPA Memorandum on Negotiation of Combined Sewer Overflow Consent Decrees dated September 16, 2003, which can be located at *http://www.cso.com/articles-publications/publication/guidance-negotiationsofCSOConsentDecrees.pdf*

elimination of all combined sewer overflows. In a recent Department of Justice press release announcing "a milestone legal agreement," resolving allegations against CSO discharges in the District of Columbia, the Department stated that under the settlement, 96% of the District's CSO volume would be captured on a system-wide basis in an average rainfall year, thus recognizing that the complete elimination of overflow was not feasible, especially in wet years.[6]

Finally, EPA's August 2004 Report to Congress entitled "Impacts and Control of CSOs and SSOs" provides further support that Congress and the executive branch have expressly recognized that the elimination of sewer overflows is not achievable in the foreseeable future.[7] Chapter Nine of the Report addresses the resources spent to address the impacts of CSOs and SSOs in the past and in the future. EPA estimates that to provide primary treatment and disinfection for 85% of combined sewer overflow volume, the future capital financial needs alone (not including operation and maintenance costs) of communities will be $50.6 billion. The projected capital costs for "reducing the frequency of SSOs caused by wet-weather and other conditions" is estimated at $88.5 billion. Thus, EPA expressly recognizes that even in the future with these vast sums of money being spent on CSOs and SSOs, the best that can be achieved are reductions in overflows, not the elimination of them.

VI. THE ADVERSE FINANCIAL IMPACT OF INVALIDATING AGENCY ENFORCEMENT APPROACHES FOR CSO COMMUNITIES IS SUBSTANTIAL.

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[6] *See http://www.usdoj.gov/enrd/DC_Sewer_Consent_Decree.pdf; http://www.dcwasa.com/news/listings/press_release208.cfm.*

[7] *http://cfpub.epa.gov/npdes/cso/cpolicy_report.cfm?program_id=5.*

The Seventh Circuit's "no realistic prospect" requirement and ruling in this case will lead to inferior environmental solutions to sewer overflows and unnecessarily higher public costs as enforcement agencies will require communities to over-plan, design, and construct to meet this new judicially-created standard.

The best way to ensure no "realistic prospect" of continuing sewer overflows is to separate storm water flows out of sanitary sewer lines in combined sewer communities such as the District of Columbia. However, such an approach results in an urban storm water discharge virtually every day it rains, instead of other CSO solutions that may feature wet weather storage and treatment that limit urban wet weather discharges to a handful of days a year. The latter is a superior result from both a human health and environmental perspective. However, "capture and treat" approaches are less certain than separation, such that a federal judicial requirement of "no realistic prospect" for future overflows will lead some communities and enforcement agencies toward inferior but more certain solutions such as sewer separation.

Moreover, if the federal judicial test is now "no realistic prospect" of future overflows for a plan to pass muster in the federal courts, rather than cost-effective phased solutions, communities will be forced to implement greater controls than they otherwise might under a phased approach. This means more planning, design and enormous construction costs -- literally billions of dollars in potentially unnecessary investments in public infrastructure.

The 2004 EPA Report to Congress found that CSO and SSO communities nationwide spent $535 billion between 1970 and 2000 on wastewater infrastructure. Report, p. 9-3. EPA estimates that current annual spending from all public sources in wastewater infrastructure is just over $13 billion a

year. As noted in Section II above, EPA has estimated future CSO spending at $50.6 billion to control 85% of CSO flows and future SSO spending at $88.5 billion. Report p. 9-3. Three recent consent decrees demonstrate how expensive the upgrades to these systems are for individual communities and the level of investments required by the cities. The most recent settlement, which was lodged with the federal district court in the District of Columbia on December 16, 2004, but not yet approved, calls for the District to pay $1.4 billion to "nearly eliminate" overflows into the Anacostia River, the Potomac River, and Rock Creek.[8] The projects set forth in the decree will take twenty years to build. In August of 2004, the City of Los Angeles agreed to a $2 billion settlement to resolve two lawsuits filed against it concerning sewage overflows. Under the terms of the settlement, Los Angeles will, in part, be required to rebuild at least 488 miles of sewer line.[9] Finally, in December 2003, Cincinnati agreed to a $1.5 billion settlement to resolve allegations against it for both CSOs and SSOs. The decree requires that Cincinnati's work must "be completed as expeditiously as possible, but no later than February, 2022."[10] The Cincinnati decree expressly acknowledges that the costs may exceed $1.5 billion, in which case additional time would be allowed under the decree.

If the Seventh Circuit's decision is not overturned and other courts were to adopt a similar standard when deciding whether a case has been diligently prosecuted, communities will face difficult and costly choices about whether to negotiate consent decrees with governmental authorities given that they may still be subject to suits from citizen groups even after promising to pay enormous sums of money to update their sewer systems. Cities will be discouraged

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[8] *http://www.usdoj.gov/opa/pr/2004/December/04_enrd_793.htm*
[9] *http://www.usdoj.gov/opa/pr/2004/August/04_enrd_542.htm*
[10] *http://www.usdoj.gov/opa/pr/2003/December/03_enrd_660.htm*

from entering into settlements with state or federal regulatory agencies because they will be asked to develop plans that ensure no realistic prospect of violation, which will call for gross speculation on the communities' part with massive amounts of public funds. In cases where decrees are negotiated, cities will have little protection from lawsuits by citizen groups second-guessing the governmental agencies and arguing for other remedial measures, when expensive projects have already been committed to. Under the Seventh Circuit's ruling those lawsuits will require detailed fact finding by the courts with only some deference to EPA or its state counterpart. If nothing else this litigation will delay the implementation of injunctive relief imposed by the enforcement agencies. This is not how Congress intended the citizen suit provision under the Act to be applied.

CONCLUSION

The Court should grant the petition for writ of certiorari to resolve the heightened conflict between the circuit courts addressing when an enforcement agency is diligently prosecuting under the Act. This issue was not fully addressed in the Court's *Gwaltney* decision. Resolution of this question will affect the investment of tens of billions of public dollars in sewer overflow control programs across the country.

Respectfully submitted,

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